Filed 4/26/06 In re Sean B. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

In re SEAN B., a Person Coming Under the Juvenile Court Law.	
AMADOR COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. SEAN S., et al., Defendants and Respondents; SEAN B., Appellant.	C049819 (Super. Ct. No. 05-DP-0178)

The infant minor, Sean B. (minor), appeals from an order granting reunification services to his parents, claiming insufficient evidence supports the juvenile court's finding that they had made reasonable efforts to correct problems leading to the prior removal of the minor's two sisters. (Welf. & Inst.

Code, § 361.5, subd. (b)(10).)[1] The minor further contends that reunification with his parents was not shown to be in his best interests (§ 361.5, subd. (c).)

The Amador County Health and Human Services Agency (the Agency) also urges us to vacate the juvenile court's order that reunification services be provided to the minor's parents.

We agree the juvenile court abused its discretion in providing reunification services: it failed to make the requisite factual finding that reunification was in the minor's best interest and, even were we to infer such a finding, it would not be supported by substantial evidence. We reverse and remand the matter for a hearing pursuant to section 361, subdivision (f).

BACKGROUND

The three-week-old infant minor was named in a juvenile dependency petition filed in March 2005, which alleged he was at the risk of suffering physical harm or illness due to substance abuse by his parents.[2] It also alleged the minor's two toddler sisters had become dependents of the court in November 2003 after one tested positive for amphetamines and marijuana. According to the detention report filed with the petition,

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[1] Further undesignated section references are to the Welfare and Institutions Code.

[2] The petition identified Sean S. as one of two men alleged to be the minor's possible father. Testing later established Sean S.'s paternity.

reunification services for the parents in this prior case were terminated in December 2004 after they "failed family reunification." (§ 300, subds. (b), (j).)

The detention also stated that marijuana and three prescription medications for which mother had no prescription (antianxiety medication, muscle relaxants, and antipsychotics were found in a dresser of the bedroom parents shared with the minor. Both mother and father claimed possession of the marijuana; mother claimed she had also recently obtained some pills for pain. The minor was detained.

At the contested detention hearing, mother denied she had smoked marijuana since the minor had come home from the hospital and testified that the only pain pills she had obtained were Midol. A county employee familiar with mother's participation in drug abuse programs since the termination of reunification services for her other children reported that mother's attendance was uneven, she took several leaves of absence from the program, and eventually was terminated for nonattendance. The court found that a prima facie case for detention had been established, and ordered the minor detained.

After the petition was amended to eliminate an allegation that mother had admitted marijuana use and the sibling abuse allegation was limited to one of the minor's sisters, the parents admitted jurisdictional allegations that marijuana was found in a room they shared with the baby, that both claimed personal possession of the marijuana, and that a sibling of the

minor became a dependent after she tested positive for amphetamines and marijuana.

In anticipation of the contested dispositional hearing (§ 361.5, subd. (c)), the Agency submitted a report asking the court to bypass reunification services for the parents on the grounds that they had failed to reunify with the two children previously removed from their home, and had failed to maintain suitable housing and successfully complete the services recommended by the alcohol and drug agencies. It noted that, during court-ordered reunification services with her other children, mother tested positive for marijuana use five times and her attendance at the court-ordered substance abuse program was "poor."[3] She tested positive for marijuana use while pregnant with the minor and on the date of the jurisdictional hearing, and has consistently refused testing thereafter. The report stated that father admitted to smoking marijuana regularly since age 15 or 16 and, although he tested clean during his reunification services with his daughters, he "was unable to stay away from his drug of choice," and had obtained a prescription for medical marijuana after the minor was detained. He, too, tested positive for marijuana on the date of the jurisdictional hearing and has refused to submit to further tests.

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[3] During reunification with the girls, mother also once tested positive for methamphetamine; her excuse was that she might have inadvertently touched some.

The Agency concluded, "these parents have made no reasonable efforts to treat the problems that led to the removal of this minor's siblings," in that they failed to obtain a suitable residence for the minor or to refrain from illegal drug use and "had not made any substantial change to their drug habits or living conditions prior to the removal of the minor in question."

At the contested dispositional hearing, a social worker testified that the minor's sisters had been detained after 17-month-old J. ingested methamphetamine and marijuana. The social worker testified father had taken no steps to address his drug use since termination of reunification services for his daughters. For her part, mother returned to a three-day-a-week perinatal drug treatment program after termination of services for the girls, but she attended sessions with decreasing frequency, and was terminated for "loss of contact." Reinstated, mother again attended a few sessions, and was again terminated for loss of contact. Within weeks after the minor's birth, she tested positive for marijuana.

Father testified he completed the recommended parenting classes offered as reunification services with his daughters, attended a drug program and only tested positive on "the very first [required test]" and "no more than two" total times. Although father stopped using marijuana during reunification with his daughters, he resumed again when services were terminated. The marijuana found in the bedroom, he explained,

was for pain relief from an August 2004 car accident "and my choice of using it for my own, you know, abuse or what not." Father has made no efforts to resume drug treatment because "unless there is [] a case plan or something pushing me there from the courts . . . , I . . . have to pay for the program by myself." When father obtained a prescription for medical marijuana, he didn't tell the prescribing doctor he had been using marijuana illegally since he was a teenager.

Mother testified she uses marijuana "[b]ecause I have a drug problem." She failed to complete a drug treatment program begun during reunification with the minor's sisters because she was injured in the August 2004 car accident and hospitalized for about three weeks. After termination of services for the girls, she explained, she was prevented from participating in the perinatal drug treatment program because after the car accident she suffered "a severe nervous breakdown"[4] and complications of pregnancy. Moreover, according to mother, her obstetrician knew she used marijuana during the pregnancy, and simply told her "not [to] overdo it." Mother nonetheless denied any knowledge of how marijuana came to be in the bedroom she shared with the minor. She expressed willingness to get back into drug treatment, but testified she cannot afford it.

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[4] Elsewhere, mother testified she suffered the breakdown in January 2004, months before the car accident.

Both counsel for the minor and the Agency argued the court should not provide mother or father with reunification services. Counsel for the Agency cited the parents' inability to reunify with their other two children, and the parents' failure thereafter to make reasonable efforts to treat the problems that led to the removal of the minor's siblings. Counsel for the minor likewise focused on the fact that, since termination of services for the first two children, mother has been unsuccessful in completing a drug program, and father has resumed marijuana use.

The court ruled: ". . . I think it is a close case. I'm really unsure whether the parents are ever going to get their act together and do what they have to do to reunite, but I'll give them one more shot at it. It appears to me that there have been efforts, and we'll find them reasonable under the circumstances. Father certainly had substantial compliance the first time around. Mother has completed the parenting class. There are extenuating circumstances as to both regarding the accident.

"At this point, I don't see that there's really any harm done by reunification services being provided. Again, the law does favor reunification, and certainly, at this point, I don't see that there's harm. If they don't complete the necessary classes, certainly they understand what the consequences will be. At this point, the Court would order a reunification plan." Later, in response to a prompt from counsel for the parents, the court agreed "the best interest of the child is to get the

reunification services." The matter was continued for the Agency to provide a reunification plan.

At the continued dispositional hearing the court made findings removing the minor from parental custody and ordered reunification services in accordance with the plan submitted by the Agency.

DISCUSSION

The minor contends that the juvenile court's order providing reunification services to his parents was not supported by the evidence and constitutes an abuse of discretion. The Agency agrees with the minor's contention. We also agree, and shall reverse the order.

As a general rule, reunification services are offered to parents whose children are removed from their custody in an effort to eliminate the conditions leading to loss of custody and to facilitate reunification of parent and child. (See § 361.5, subd. (a).) This furthers the goal of preservation of family, whenever possible. (*In re Baby Boy H*. (1998) 63 Cal.App.4th 470, 474, 478.)

However, the Legislature also recognizes that it may be futile to provide reunification services under certain circumstances. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 470-471; *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 750; § 361.5, subd. (b).) Section 361.5, subdivision (b)(10), states in pertinent part that "(b) Reunification services need not be provided to a parent . . . described in this subdivision

when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (10) That the court ordered termination of reunification services for any siblings . . . of the child because the parent . . . failed to reunify with the sibling . . . after the sibling . . . had been removed from that parent . . . and that parent . . . is the same parent . . . described in subdivision (a) and that, according to the findings of the court, this parent . . . has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling . . . of that child from that parent . . . ."

This subdivision "recognizes the problem of recidivism by the parent despite reunification efforts. Before this subdivision applies, the parent must have had at least one chance to reunify with a different child through the aid of governmental resources and have failed to do so. Experience has shown that with certain parents, as is the case here, the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume reunification efforts will be unsuccessful." (*In re Baby Boy H.*, *supra*, 63 Cal.App.4th at p. 478; *In re Joshua M., supra,* 66 Cal.App.4th at p. 470; see also *In re Harmony B.* (2005) 125 Cal.App.4th 831, 842-843 [Legislature does not permit a court to deny services simply on a finding that services had been terminated as to an earlier child if the parent has worked toward correcting the underlying problems, but it did not intend "to create further delay so as

to allow a parent, who up to that point has failed to address his or her problems, another opportunity to do so"].)

If the juvenile court finds that subdivision (b)(10) of section 361.5 applies, it "shall not order reunification for a parent . . . unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c), 2d par.) "Once it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.'" (*In re Ethan N*. (2004) 122 Cal.App.4th 55, 65, quoting *In re Baby Boy H., supra,* 63 Cal.App.4th at p. 478.)

The minor argues that the juvenile court failed to make the statutorily required findings that (1) parents made reasonable efforts, subsequent to the termination of reunification services for their daughters, to treat the problems that led to their removal (§ 361.5, subd. (b)(10)), and (2) reunification with the parents would be in the minor's best interest (§ 361.5, subd. (c).) Moreover, he argues, there is no substantial evidence to support those findings.

We agree with the minor that the juvenile court's failure to apply the statute making the requisite findings concerning the parents' posttermination efforts was error.

Under section 361.5, subdivision (b)(10), reunification services are not provided in a current case to parents who have failed to reunify with other children, unless the parents

have "subsequently made a reasonable effort" to treat the problems leading to the prior removal. Here, the court found "reasonable" efforts, but failed to find those efforts were made "subsequent" to the prior removal of the minor's sisters. To the contrary, the court refers exclusively to pretermination actions or events: The court's references to father's having "had substantial compliance the first time around" clearly refers to pretermination events, and the car accident which presumably gave rise to the "extenuating circumstances" identified by the court also occurred months before services were terminated. Likewise, its reference to mother's completion of a parenting class refers to a class she completed on July 7, 2004, months *before* termination of reunification services for the girls.

Assuming for argument's sake substantial evidence supports the juvenile court's finding that parents' pretermination efforts to treat the problems that led to their daughters' removal were reasonable,[5] no substantial evidence supports an implied finding that they made reasonable efforts *after* reunification services for the siblings were terminated. (Cf. *In re Harmony B., supra,* 125 Cal.App.4th at p. 842.) There was no evidence from which the court could have concluded father

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[5] Of course, the court necessarily would have evaluated these, and other, pretermination efforts by the parents, but it evidently concluded these efforts were collectively inadequate to support a determination that the daughters should be returned to them. (Cf. § 366.21, subds. (e), (f), (g)(1)(B), (C).)

made any effort following termination of services to address the drug use which was chief among the problems leading to the girls' removal: father admitted he went straight back to abusing marijuana after services were terminated and has made no efforts to stop. Nor was there evidence to support an implied finding mother made reasonable efforts to address her drug use *after* termination of services, as required by the statute (§ 361.5, subd. (b)(10)); rather, it shows she failed to complete drug treatment and tested positive for marijuana. A parent's failure to comply with drug treatment programs and continued positive drug tests justify a finding of no reasonable efforts to treat the drug problems after termination of services for other children. (Cf. *In re Joshua M., supra,* 66 Cal.App.4th at pp. 466, 470, 476.)

We also agree with the minor that there is no substantial evidence supporting the conclusion that his best interest is served by reunifying with his parents. (§ 361.5, subd. (c).) Not only did the parents fail to reunify with the toddler daughters removed from their care after one tested positive for marijuana and amphetamine, but within months after services were terminated, the parents were making little effort (in mother's case) or no effort (in father's case) to control their illegal marijuana use, or to alter their living conditions. Mother could not sustain participation in a drug treatment program while she was pregnant, and both parents soon returned to essentially the same conditions that led to the removal of their other children: they abused marijuana, refused to undergo any

further drug testing, and chose to live with their infant in a single room in the home of a man mother identified as a drug user.[6] These choices by the parents show that providing reunification services for the minor will be a futile act. "Certainly, it cannot serve a child's best interest to unnecessarily prolong the lengthy dependency process when there is no chance of successful reunification because of circumstances that make it 'fruitless to provide reunification services . . . .' [Citation.]" (*In re Joshua M., supra,* 66 Cal.App.4th at p. 470.)

We conclude that the juvenile court abused its discretion in ordering that reunification services be provided.[7]

DISPOSITION

The order of the juvenile court granting reunification services to the minor's parents is reversed and the matter is remanded. The juvenile court is directed to enter an order terminating reunification services, and the Amador County Health and Human Services Agency is directed to set this matter for a

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[6] Their landlord told police the minor and his parents also shared their room with an "aggressive dog" that has "a history of biting people."

[7] Under the circumstances, we need not address the minor's alternative contention that the juvenile court erred in ordering reunification services for Sean S. because he had not been granted presumed father status and the court had not found that it would benefit the minor to provide services to Sean S. (§ 361.5, subd. (a).)

hearing pursuant to section 361.5, subdivision (f), as soon as possible.

DAVIS, Acting P.J.

We concur:

MORRISON, J.

BUTZ, J.